80-889

Supreme Court, U. S.
FILED
DEC 1 1980
MICHAEL RODAK, JR., CLERK

NO. _____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MUHAMMAD F. MALIK, Petitioner

V.

HIDDEN VALLEY Civic Club and
GEORGE A. TURNER, Respondents

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of Texas by and through its laws, rules, courts and officials denied Petitioner his right to appeal an infirm, adverse State court decision in violation of the Fourteenth Amendment to the United States Constitution when the State caused Petitioner to default on a state procedural rule and Petitioner was prejudiced thereby.

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OPINIONS BELOW

The Texas Supreme Court did not issue an opinion in this case, but rather Notified Petitioner by postcard that his Application for Writ of Error was refused finding no reversible error, a photostatic copy of which is found in Appendix A hereto, infra, page 1. A photostatic copy of the Judgement and Opinion of the Court of Civil Appeals for the 1st Supreme Judicial District of Texas is found in Appendix B hereto, infra, page 1. A photostatic copy of the Order of Permanent Injunction of the 125th District Court of Harris County, Texas, is found in Appendix C hereto, infra, page 1.

JURISDICTION

The judgement of the Supreme Court of Texas was entered on September 10, 1980. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257(3). Also, 28 U.S.C. Section 2403(b) may be applicable.

CONSTITUTION AND STATUTES

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said Section reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Article 4591, Vernon's Annotated Civil Statutes ("V.A.C.S."). This Article reads as follows:

"The first day of January, the third Monday in February, the second day of March, the 21st day of August, the first Monday in September, the second Monday in October, the 11th day of November, the fourth Thursday in November, and

the 25th day of December, of each year, and every day on which an election is held throughout the state, are declared legal holidays, on which all public offices of the state may be closed and shall be considered and treated as Sunday for all purposes regarding the presenting for the payment or acceptance and of protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes placed by the law upon the footing of bills of exchange. The nineteenth day of January shall be known as "Confederate Heroes Day" in honor of Jefferson Davis, Robert E. Lee and other Confederate heroes."

This case also involves Article 2372h-1, V.A.C.S. Said Article provides in relevant part as follows:

"In each county of this State, each elected county officer or the Commissioner's Court, as the case may be, shall have authority to provide for vacations, holidays fixed by State law, and sick leaves, without deduction or loss of pay, and to provide for deductions for absences, for the employees working under the elected county officer or his appointees, regardless of whether the employee is

paid on a fixed salary basis or on the basis of an hourly or daily wage. . ."

This case also involves General and Special Laws of Texas, Vol. 2, Chapter 843, V.A.C.S. This law provides in relevant part as follows:

"Employees of the State shall, without deduction in salary, be entitled to, in addition to leave provided in this Section, vacation or leave time on. . . December 24."

This case also involves Rules of Civil Procedure (Texas), Rule 329b(1), Texas Rules of Civil Procedure (T.R.C.P.). Said Rule provides as follows:

"A motion for new trial, if filed, shall be filed within ten (10) days after the judgement or other order complained of is rendered."

This case also involves Rule 4, T.R.C.P. Said Rule provides as follows:

"In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period

so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday."

.....

STATEMENT OF THE CASE

In early 1979, certain members of the Hidden Valley Civic Club ("the Civic Club"), which comprises approximately 300 dues paying members of residents and lot owners of the Hidden Valley subdivision of Houston Harris County, Texas, observed Petitioner MUHAMMAD F. MALIK, a United States citizen of Pakistan origin and of the Muslim faith, placing what they believed to be two (2) mercury security lights in his front yard.

The attorney for the Civic Club contacted petitioner by U.S. mail informing him that he was in violation of certain deed restrictions. The attorney's letter was dated April 10, 1979. Shortly thereafter, on April 16, 1979, petitioner contacted the attorney for the Civic Club stating that he did not believe he was in violation of the deed restrictions but that he would like the attorney to underline the deed restrictions that were allegedly being violated. Petitioner enclosed a copy of his deed restrictions in the letter to said attorney, but the attorney did not respond although he received the letter.

On May 11, 1979, respondent Hidden Valley Civic Club commenced suit in the 11th Judicial District Court of Harris County, Texas, requesting, inter alia, a temporary and permanent mandatory injunction ordering petitioner herein and defendant in the above cause to remove the two (2) security lights that were the subject of that cause. Petitioner was ordered therein to show cause why the two (2) lights should not be removed. On June 7, 1979, the petitioner appeared in the 190th Judicial District Court and specially excepted to the Civic Club being a plaintiff in the cause since it was not given standing to bring such an action in the deed restrictions. That is, the Civic Club was not an owner of a lot within the Addition, citing Garden Oaks Board of Trustees v. Gibbs. Petitioner in his answer also denied that he installed two (2) security lights in his yard, but only one. Petitioner prayed that the case be dismissed.

The 190th District Court overruled the special exception and signed and rendered a temporary injunction which omitted reference to the security lights in question.

On June 11, 1979, the Civic Club requested a preferential setting for the week of July 23, 1979, to which it was entitled as a matter of law. However, the motion was denied by Judge Jack Smith of the 189th District Court on June 12, 1979. Shortly thereafter, on June 21, 1979, petitioner filed an application for trial by jury which was granted as a matter of right. However, on June 29, 1979, respondent GEORGE A. TURNER was joined as a party plaintiff when plaintiffs filed their First Amended Original Petition.

On August 8, 1979, respondents requested preferential setting for the second time as a matter of law for trial the week of October 15, 1979. On August 13, 1979, Judge Ruby Sandock of the 234th District Court granted the preferential setting.

On October 15, 1979, petitioner filed Defendant's Amended Answer again specially excepting to the Civic Club being included as a party plaintiff and requested that the Civic Club should be dismissed. Judge Charles L. Price of the 125 District Court indicated he would take the motion under consideration during trial.

On October 16, 1979, trial by jury commenced in the 125th District Court.

On October 17, 1979, after the respondents herein had concluded evidence in their case, petitioner herein moved the court for instructed verdict. Apparently, the court carried the motion along with petitioner's case, for he apparently overruled Defendant's Motion for Instructed Verdict after the conclusion of evidence of petitioner herein and hearing more evidence from respondents herein. Petitioner and respondents then rested their respective case. Thereafter, the court prepared the charge of the court and both parties made their objections and exceptions thereto, and submitted their own charge or special issues. The court, thereafter, dismissed the Civic Club as a plaintiff before the jury was seated and charged by the court. Respective counsels presented their arguments before the court sent the case to the jury. The jury reached a ten (10) to two (2) verdict and returned the same to the court. The court received the verdict and ordered the filing thereof among the papers of said cause, and thereafter the court duly discharged the jury.

On October 23, 1979, respondent TURNER filed his Motion for Judgement on Findings of Jury. However, on November 7, 1979, petitioner filed his Opposition to Plaintiff's Motion for Judgement on Findings of Jury and Defendant's Motion for Judgement Non Obstante Veredicto. On November 12, 1979, the court held a hearing on the above motions and the court found, inter alia, that the evidence was insufficient to support a finding that both of the relevant security lights were installed upon defendant's, petitioner herein, premises. However, the court ordered petitioner herein to remove his security light within forth-five (45) days from the date of signing the order.

On December 13, 1979, the court signed and rendered the Order of Permanent Injunction. (See Appendix C, page 1).

A. Status of Law During This Period. Rule 329b(1) of the Texas Rules of Civil Procedure ("T.R.C.P."), grants applicants ten (10) days to file a motion for new trial after judgement has been rendered. Rule 4 T.C.R.P. provides in relevant part as follows:

> "In computing any period of time prescribed or allowed by these rules . . . The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday."

The source of Rule 4 is stated to be Federal Rule 6(a).

Until July 25, 1979, it was generally held that legal holidays in the state of Texas were enumerated in Article 4591, Vernons Annotated Civil Statutes (V.A.C.S.). On that date, the Texas Supreme Court held in Mid-Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (Tex. Spr. Crt. 1979) that Monday, January 2, 1978, was a "legal holiday for procedural purposes" within the meaning of Rule 4, T.R.C.P. even though January 2, 1978, was not listed as one of the enumerated legal holidays under Article 4591. In fact, at all relevant times stated herein, the Texas Court of Civil Appeals for the 1st Supreme Judicial

District had held as much in Seismic & Digital Concepts, Inc. v. Digital Resources Corporation, 583 S.W.2d 442 (Tex. Civ. App. - Houston [1st Dist.] 1979. In Seismic & Digital Concepts, appellant therein sought an extension of time in which to file a statement of facts under the mandatory fifteen (15) day time limit of Rule 21c, T.R.C.P. In that case, the fifteen (15) day period ended on April 13, 1979, which was "Good Friday". The Texas Court of Appeals for the 1st Supreme Judicial District held that since the attorney for appellant did not call said Court of Civil Appeals directly, but instead relied on information relayed to him on April 12, 1979, by the Harris County Switchboard Operator that April 13, 1979, was a legal holiday and that the courthouse would be closed, appellant failed to file his motion within the mandatory time limit when, in fact, court personnel were present the entire day of April 13, 1979, i.e. Good Friday.

STATEMENT OF CASE CONTINUING

Under Rules 329b(1) and Rule 4, T.R.C.P., the last day for petitioner herein to timely file a motion for new trial would have been on December 24, 1979,

unless it was considered a holiday for procedural purposes. On the morning of December 24, 1979, which is generally known as Christmas Eve, petitioner's attorney telephoned the Harris County Switchboard Operator regarding filing a motion for new trial, and said operator informed said attorney that the Office of Ray Hardy, District Clerk of Harris County, was closed due to December 24, 1979, being a holiday. (See copy of affidavit of Ray Hardy labeled Appendix D, page 1; the original of which is among the papers filed in the federal removal proceedings Hidden Valley Civic Club, et al v. Muhammad F. Malik, Civil Action No. H-80-806 with the United States Federal District Clerk for the Southern District of Texas, Houston Division, on April 11, 1980; see Appendix D, page 2.)

In a further attempt to file the motion for new trial, petitioner's attorney proceeded to the Harris County Civil Court Building where such motions are filed. However, the attorney discovered the doors of the building were locked and a sign on the door informed him that due to December 24, 1979, being a holiday, it was closed. There were no signs or

notices directing said attorney to a place, if any, where such motions could be filed. Petitioner's attorney had practiced law in Harris County, Texas for four and one-half years (4-1/2) at that time, including three (3) years with the Texas Attorney General and had never known or heard of a place other than the Fourth Floor of the Harris County Civil Courts Building where such motions may be filed. In fact, no other attorney in Harris County, Texas, that petitioner's attorney has questioned since the date of Mr. Hardy's affidavit has heard of such a procedure with the exception of respondents' attorney.

Since the Harris County District Clerk's Office was also closed on December 25, 1979, Christmas, it was not until December 26, 1979, that petitioner could and did file his motion for a new trial in the 125th District Court. In said motion, petitioner set forth the clear state law with respect to a cause that has been submitted to the jury on special issues. In short, petitioner set forth in his motion that material issues must be answered by the jury, and if in hopeless conflict and cannot be reconciled,

the judge cannot alter the verdict, and in such case the findings destroy each other and amount to no verdict and compel a mistrial. See Blanton v. E & L. Transport Co., 146 Tex. 377, 207 S.W.2d 443, 445 (1950); Bay Petroleum Corp. v. Crumpler, 372 S.W.2d 318 (1963); Bradford v. Arhelger, 340 S.W.2d 772 (1960); and Bell Cab Co. v. Vasquez, 434 S.W.2d 714 (1968). In said motion, petitioner stated that the same result follows when the conflict is between answers to a general issue and to a specific issue necessarily included within the general, or is between answers to an "ultimate" issue and to an "evidentiary" issue necessarily included within the "ultimate"; from this it follows that even though a conflicting finding be in reply to a special issue which should not have been submitted, because already covered by other special issues, yet the destructive finding may force a mistrial. See Panhandle v. Byrd, 106 S.W.2d 660 (1937); also see Ellis v. State 27 Tex. App. 190, 11 S.W.111 (1889) and Crosby v. Stevens, 184 S.W.2d 705 (1916).

In the trial court below, the jury reputedly found in its answer to Issue No. 2 that defendant's, petitioner herein, security lights on his lot amounted to a substantial violation of the deed restrictions, and reputedly found in its answer to Issue No. 3 that petitioner installed two (2) lights on his lot. Subsequently, however, the court had found that the evidence was insufficient to support a finding that both of the two (2) security lights were installed upon petitioner's lot. On the other hand, in its answer to Issue No. 5, the jury reputedly found that other similar security lights in the relevant geographical area were not a substantial violation of said restrictions. Thus, the jury in essence made a finding that a security light in the neighborhood, which was not on petitioner's lot, was a substantial violation in its answer to a specific (evidentiary) issue, then subsequently came to a clearly conflicting answer to the general issue that there were no other substantial violations in the neighborhood besides petitioner. Petitioner had affirmatively pleaded, inter alia, waiver and estoppel.

On January 28, 1980, after hearing on the motion for new trial, the trial court once more denied petitioner a clear legal right he sought to exercise.

On February 22, 1980, petitioner filed his motion to extend time to file transcript and statement of facts with the Court of Civil Appeals until March 28, 1980. Petitioner filed his appeal bond pursuant to Rule 356, T.R.C.P. on February 26, 1980, and pursuant to request by telephone by the clerk of the Court of Civil Appeals, petitioner mailed a letter to said clerk advising her of the date petitioner's motion for new trial was filed. On March 3, 1980, however, respondents filed their opposition to extend time for filing alleging, inter alia, that petitioner already had until March 28, 1980, to file the record on appeal under Rule 386, T.R.C.P. However, on March 5, 1980, respondents filed their first amended opposition to petitioner's motion for extension of time to file the record on appeal alleging that the Court of Civil Appeals lacked appellate jurisdiction based on the allegation that petitioners motion for new trial was filed tardy.

On March 6, 1980, the Court of Civil Appeals extended petitioner's time to file the transcript and statement of facts to and including March 28, 1980. On March 10, 1980, petitioner filed his response to respondents' first amended opposition and respondents filed their motion for contempt in the 125th District Court for failure of petitioner to remove his security light and that he be confined to jail. On March 11, 1980, petitioner delivered the transcript to the clerk who refused to file the same. On March 18, 1980, petitioner delivered the statement of facts to said clerk who refused to file same. Earlier, on March 14, 1980, petitioner filed a supersedeas bond in the amount of $2000.00, and on March 19, 1980, filed an additional supersedeas bond pursuant to request by respondents.

On April 10, 1980, however, the Court of Civil Appeals, after ordering the transcript and statement of facts filed, dismissed petitioner's appeal for want of jurisdiction. (See Appendix B, page 1). On that same day, petitioner filed his motion for rehearing (See Appendix D, infra), pages 5 and 6. On April 11, 1980, petitioner

removed the proceedings in the 125th District Court, the trial court, to the United States District Court for the Southern District of Texas, Houston Division, and filed a copy with the 125th District Court. (See Appendix D, infra, page 2).

On April 14, 1980, petitioner filed an amendment of his motion for rehearing in the Court of Civil Appeals (See Appendix D, infra, pages 7 and 8) and hand delivered a copy of petitioner's removal petition to the Judge of the trial court who had not received the earlier copy filed late the preceeding Friday with the clerk, thereby removing the contempt proceedings scheduled for that day.

On or about April 17, 1980, respondents filed their motion to remand the contempt proceedings back to the state trial court and on April 22, 1980, the federal district court gave notice that respondents' motion to remand had been placed on the court's motion docket for May 12, 1980.

On April 24, 1980, the Court of Civil Appeals overruled petitioner's motion for rehearing, and on April 25, 1980,

within the fifteen (15) day period for filing amendments to motions for rehearing, petitioner filed his supplemental motion for rehearing. (See Appendix D, infra, pages 9 thru 12). On the same day, respondents filed their motion in support of overruling motion for rehearing.

On May 8, 1980, the Court of Civil Appeals refused petitioner's supplemental motion.

On or about May 8, 1980, petitioner filed with the federal clerk his response to respondents' motion to remand and on May 12, 1980, the federal district court held a hearing on respondents' motion to remand. The federal district court took the matter under advisement.

On May 16, 1980, petitioner deposited his application for writ of error to the Texas Supreme Court with the Court of Civil Appeals, and said application was filed with the Texas Supreme Court on June 2, 1980. (See Appendix D, infra, pages 13 thru 31).

On June 6, 1980, the federal district court remanded the contempt proceedings to the state trial court.

On June 17, 1980, the Texas Supreme Court received and filed respondents' reply to application for writ of error.

On or about June 18, 1980, respondents reset their motion for contempt in the 125th District Court for July 14, 1980. However, on July 14, 1980, petitioner specially excepted and opposed respondents motion for contempt, and after a hearing thereon, the court, surprisingly, ruled in petitioner's favor and dismissed respondent's motion for contempt.

On September 10, 1980, the Texas Supreme Court refused petitioner's application for writ of error, finding no reversible error. (See Appendix A, page 1.)

Petitioner gave notice on or about October 2, 1980, to the clerks of the Texas Supreme Court, the Court of Civil Appeals and the District Court of Harris County that he intended to file a petition for writ of certiorari in the Supreme Court of the United States.

Thus, after a long, winding and tiresome journey, petitioner now hopes to reach the ear of the Honorable Supreme Court of the United States who can

correct the infirmities that have occurred below. The Texas state courts, which judges are duly elected by their respective constituents, have been faced, not only with the duty of applying the fair and correct law in the case, but also with the choice of ruling in favor of what could realistically be conceived of as approximately three hundred (300) or more voting residents or a sole United States citizen of Pakistani origin and of the Muslim faith.

REASONS FOR GRANTING THE WRIT

It is clear that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a state to provide appellate review. Lindsey v. Normet, 92 S.Ct. 862, 405 U.S. 56 (1972). However, where a state provides appellate review, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. Lindsey v. Normet, Id. Moreover, due process requires that a state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede open and equal access

to the courts. Robinson v. Beto, 426 F.2d 797 (5th Cir. 1970). "Equal protection of the law" implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination. Republic Pictures Corp. v. Kappler, 151 F.2d 543 (8th Cir. 1945), 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 1040.

As to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts. Fox Film Corp. v. Muller, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935). However, where state procedural rules are concerned, a petitioner can show "cause" for failure to follow a state procedural rule and "prejudice" resulting to him from that state procedural default. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). Moreover, even

assuming the state has a strong interest in requiring strict compliance of a state procedural rule, that assumption is inapplicable in a case in which the action of the state court itself made necessary the procedural default that occurred. See White v. Estelle, 566 F.2d 500 (5th 1978).

THE FACTS

On December 13, 1979, the state trial court rendered judgement. Under the ten (10) day rule embodied in Rule 329b(1), T.R.C.P., the last day to timely file a motion for a new trial was on December 24, 1979, unless it was considered a holiday for procedural purposes. On the morning of Christmas Eve, petitioner's attorney telephoned the Harris County Switchboard Operator and was informed that the district clerk's office was closed due to that day being a holiday. Wanting to make sure that the district clerk's office was closed, in the early afternoon of the same day, petitioner's attorney proceeded to the Harris County Civil Courts Building where motions for new trial in civil cases are filed. However, having arrived at said courthouse, petitioner's attorney discovered

the doors of the building were locked and a sign on the door informed him that due to December 24, 1979, being a holiday, it was closed. There were no signs or notices directing petitioner's attorney to a place, if any, where such motions could be filed. (See Appendix D, page 1).

On the other hand, the affidavit of the pertinent district clerk of Harris County, Ray Hardy, indicates that certain classes of attorneys could have filed a motion for new trial on Christmas Eve 1979: (1) those attorneys who call the Harris County Switchboard Operator and receive the telephone number of an appropriate person to contact in case of an emergency; and (2) those attorney's who personally know the district clerk or his deputy and their telephone numbers and feel free to call these gentlemen at home on holidays such as Christmas Eve when their office is closed to others. Of course, all this assumes that the filing would be classified as "an emergency," for if the deputy clerk determined December 24, 1979, was "a holiday for procedural purposes" or

otherwise believed the filing date would be extended, the filing, presumably, would not be permitted. If fact, the relevant case law at that time would seem to hold that the filing date would be extended. See Mid-Continent Refrigerator Company v. Tackett, supra; and Seismic & Digital Concepts, Inc. v. Digital Resources Corporation, supra.

Petitioner's attorney did not personally know, or know at all, either the district clerk or his chief deputy, which is not uncommon in a city the size of Houston, Harris County, Texas, where thousands of attorneys compete to make a living. Even if petitioner's attorney knew the telephone numbers of the district clerk or his chief deputy, which he did not know, without knowing it was necessary and he was entitled to call these persons on Christmas Eve regarding filing a motion, out of common, human courtesy, he would not have felt free to call said persons regarding making special provisions for him to file a motion that day. Nor would said attorney have had any reasonable expectations that the district clerk or chief deputy would make special arrangements for filing a motion on Christmas Eve, their holiday from work.

Although petitioner's attorney called the switchboard operator and inquired about the filing of a motion for new trial, said operator did not give him any information regarding the same. Thus, due to the district clerk's office being closed, due to petitioner's attorney not personally knowing the district clerk and due to the county switchboard operator not informing said attorney of vital information of which he was entitled, petitioner failed to follow a state procedural rule. Petitioner was thereby denied his right to appeal his case in the state courts where he probably would have prevailed due to a conflicting jury verdict on special issues.

Petitioner avers that he was capriciously and arbitrarily denied his right to appeal in violation of due process and equal protection of the law. Lindsey v. Normet, supra. Petitioner further alleges that the Texas state courts have made unreasoned distinctions that impede open and equal access to the courts. Robinson v. Beto, supra. It is clear from the above that the combined effect of certain state statutes, the action of

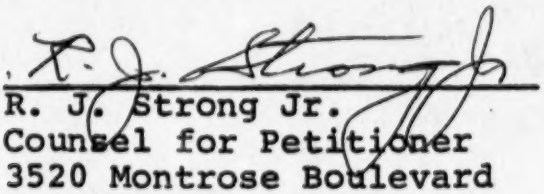
state officials in closing the Harris County Civil Courts Building, the failure of the Harris County Switchboard Operator to give vital information and the unreasonable procedure of the Harris County District Clerk to file motions on Christmas Eve 1979, have all caused the failure of petitioner to file his motion for new trial on December 24, 1979, which resulted in prejudice to petitioner in denying his right to appeal on grounds that in all probability would have necessitated a reversal and remand

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgement of the Supreme Court of Texas in Muhammad F. Malik v. Hidden Valley Civic Club and George A. Turner. In the event that the petition is granted, petitioner prays that the judgement of the Court below be reversed, that the cause be remanded, and that the Court below be

directed to issue the Writ of Error as prayed for in the petition.

Respectfully submitted,



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APPENDIX A

CLERK, SUPREME COURT OF TEXAS
BOX 12248, CAPITOL STATION
AUSTIN, TEXAS 78711

OFFICIAL BUSINESS
STATE OF TEXAS
STATE PENALTY
FOR PRIVATE USE

AUSTIN
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P.B. METER P.B. 970244

THIS SIDE OF CARD IS FOR ADDRESS

R. J. STRONG, JR., Attorney
3520 Montrose Blvd., Suite 211
Houston, Texas 77006

CLERK'S OFFICE - SUPREME COURT

Austin, Texas September 10, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of B-9475, MUHAMMAD F. MALIK v. HIDDEN VALLEY CIVIC CLUB ET AL

was this day refused. No reversible error.

Very truly yours,
GARSON R. JACKSON, Clerk

APPENDIX B

COPY OF JUDGMENT

MUHAMMAD F. MALIK

NO. 17694 VS. Appeal from District Court of Harris County. (Tr. Ct. #79 20713) Opinion delivered by Chief Justice Coleman, Justices Wallace and Doyle sitting.

HIDDEN VALLEY CIVIC CLUB ET AL

This cause, being an appeal from the judgment rendered and entered by the court below on December 13, 1979, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that the appeal bond was not timely filed in accordance with the provisions of Rule 356, T.R.C.P. it is therefore considered, adjudged and ordered that the appeal herein be, and the same hereby is, dismissed for want of jurisdiction.

It is further ordered that the appellant, Muhammad F. Malik, and his surety, Lawyers Surety Corporation, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance.

Judgment rendered by panel consisting of Chief Justice Coleman and Justices Wallace and Doyle.

....

Appeal Dismissed for w.o.j. and opinion filed April 10, 1980.

MUHAMMAD F. MALIK, APPELLANT

No. 17694 VS.

HIDDEN VALLEY CIVIC CLUB & GEORGE TURNER, APPELLEES

- - - - - - - - - - - - - - - - - -

Appeal from the District Court of Harris County, Texas,

125th Judicial District

- - - - - - - - - - - - - - - - - -

George A. Turner, plaintiff in the trial court, has brought to the attention of this court his contention that Muhammad F. Malik, defendant in the trial court, has failed to perfect his appeal to this court by reason of the fact that he failed to file a cost bond within 30 days from the date of the entry of judgment by the trial court. Malik contends that December 24, 1979, was a legal holiday and that by reason of this fact his filing of his motion for new trial on December 26, 1979, was timely. If the motion for new trial was filed within 10 days of the date the judgment was signed, the cost bond was filed in a timely manner and this court has acquired jurisdiction of the appeal.

We conclude that this court lacks jurisdiction to entertain the appeal.

Plaintiff's motion for new trial was not filed within 10 days from the date on which the judgment was signed. The judgment was signed on the 13th day of December, 1979. Rule 4, T.R.C.P., provides that the day of the act or event after which the designated period of time begins to run is not to be included. The 10 day period for the filing of the motion for new trial therefore would end on December 24, 1979, unless it is a legal holiday. The legal holidays in the State of Texas are enumerated in Article 4591, V.A.C.S. December 24, is not listed as a legal holiday in that Article. Malik relies on the holding of the Supreme Court in Mid-Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (Tex.1979) in which the court determined

that January 2, 1978 was a legal holiday for procedural purposes within the meaning of Rule 4 of Tex.R.Civ.P. The Supreme Court pointed out that "the Legislature in 1977 Tex.Gen.Laws, chapter 872, at page 3145 specifically declared Monday, January 2, 1978, to be a "holiday" for State employees." The court pointed out that the numbers and dates of State holidays are directly related to the appropriation of funds for hours and days of work by State personnel from the State treasury. The Act of the Legislature cited was the Appropriation Bill for the biennium 1978-1979.

The Appropriations Act effective on December 24, 1979, is found in General and Special Laws of Texas, vol. 2, chapter 843. Paragraph 3 of Section 6, Chapter 843, supra, at 2900, provides that holidays for State employees shall be those specified in Article 4591, V.A.C.S. Chapter 843, Section 7, paragraph b, supra, at 2901, provides:

> "Employees of the State shall, without deduction in salary, be entitled to, in addition to leave provided in this Section, vacation or leave time on Friday immediately following the 4th Thursday in November, and December 24 and December 26."

It is apparent that the Appropriations Act does not constitute December 24, 1979, a legal holiday.

The motion for new trial was not timely filed. In such a case the time for filing of an appeal bond begins on the date the judgment is signed. The tardy filing for a motion for new trial does not operate to extend the time for filing the appeal bond even though the late motion be considered and overruled by the trial judge. Metal Enterprises, Inc. v. Don Love, Inc., 559 S.W.2d 90 (Tex.Civ.App.--Houston [1st Dist.] 1977, no writ).

A cost bond was filed in this case on February 26, 1980. It was not filed within 30 days from the date the judgment was signed.

This court cannot acquire jurisdiction of an appeal where an appeal bond has not been timely filed; Metal Enterprises, Inc. v. Don Love, Inc., supra; Washington v. Golden State Mutual Life Insurance Company, 408 S.W.2d 227 (Tex.1966).

The appeal is dismissed.

/s/ Tom F. Coleman
Chief Justice

Panel consists of Coleman, Chief Justice, Wallace and Doyle, Justices.

Judgment rendered and opinion filed April 10, 1980.

APPENDIX C

R. 683

NO. 79-20,713

HIDDEN VALLEY CIVIC CLUB AND GEORGE A. TURNER	*	IN THE DISTRICT COURT OF
VS.	*	HARRIS COUNTY, TEXAS
MUHAMMAD F. MALIK	*	125TH JUDICIAL DISTRICT

ORDER OF PERMANENT INJUNCTION

On the 15th day of October, 1979, came on to be heard in the above styled and numbered cause Plaintiffs' application for a permanent injunction and reasonable attorney's fees against the Defendant, MUHAMMAD F. MALIK, and then came Plaintiffs HIDDEN VALLEY CIVIC CLUB and GEORGE A. TURNER and announced ready for trial, and then came the Defendant, MUHAMMAD F. MALIK, and announced ready for trial.

Thereupon, a jury having been demanded by the Defendant, a jury was called, tested, selected and duly empaneled and sworn, and on October 16, 1979, the case proceeded to trial with the reading of the pleadings and opening remarks, and continued with the introduction of evidence until October 17, 1979, at which time the evidence on behalf of Plaintiffs and Defendant having been concluded, the Court over-ruled Defendant's motion for instructed verdict, and the parties having rested their respective cases, the Court prepared the charge of the Court, and both parties were give the opportunity to make their objections and exceptions thereto, and to submit their own charge or special issues.

Whereupon, after the Court having dismissed HIDDEN VALLEY CIVIC CLUB as a Plaintiff and having granted a take nothing judgment with respect to Plaintiffs' request for an order enjoining the Defendant from using the property made a basis of this suit as a dwelling for more than a single family, and from parking or permitting the parking of any automobile or truck not in daily use whether on his said lot or lots or on the street adjacent thereto for more than one week unless stored in a closed garage, the jury was seated and charged by the Court, and counsel for Plaintiff GEORGE A. TURNER and counsel for Defendant presented their arguments, and the case was duly sent to the jury; and the jury having duly returned and deliberated, reached a

a 10 to 2 verdict and returned same unto the Court, as provided by law, at 12:30 p.m. on October 18, 1979. Upon Plaintiff's motion, such verdict was received by the Court and ordered filed among the papers of this cause, and the jury was discharged.

Special Issues submitted to the jury and the jury's answers thereto were as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the security light or lights erected by Defendant Muhammad F. Malik on his lot is a "utility structure" within the meaning of the Hidden Valley Section 8 subdivision restrictions?

Answer "We do" or "We do not"

ANSWER: "WE DO"

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that the erection of the security light or lights by Defendant Muhammad F. Malik on his lot is a substantial violation of the Hidden Valley Section 8 subdivsion restrictions?

Answer "We do" or "We do not"

ANSWER: "WE DO"

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the Defendant, Muhammad F. Malik (a) installed both mercury security lights in question and (b) that both mercury security lights are located on Defendant Muhammad F. Malik's lot?

Answer "We do" or "We do not" separately in the spaces provided in (a) and (b) below.

	We Do	We do not
ANSWER: (a) Malik installed both lights	"WE DO"	
(b) Both lights located on Malik's lot	"WE DO"	

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that there was an unreasonable delay which has worked injury to Defendant Muhammad F. Malik on the bringing of this suit by Plaintiff Turner from the time the Plaintiff Turner knew or should have known that Defendant Muhammad F. Malik was installing or had installed a mercury security light?

Answer "We do" or "We do not"

ANSWER: "WE DO NOT"

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that prior to the installation of a security light by Defendant Muhammad F. Malik there were other similar security lights located in other yards of other lots in Section 8 of Hidden Valley?

Answer "We do" or "We do not" in the space provided in Column 1 below.

If you have answered "We do" in Column 1 below, then do you find from a preponderance of the evidence that such similar security lights

were a substantial violation of the restrictions of Section 8 of Hidden Valley?

Answer "We do" or "We do not" in the space provided in Column 2.

ANSWER:	Column 1 Other similar security lights	Column 2 Substantial violation
	"WE DO"	"WE DO NOT"

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that (a) light poles installed by the builder in the front yards of lots in Section 8 of Hidden Valley and (b) Basketball backboard goals installed on lots in Section 8 of Hidden Valley are "Utility structures" within the meaning of the Hidden Valley Section 8 restrictions?

Answer separately "We do" or "We do not" in Column 1 provided in (a) and (b) below.

If you have answered "We do" in Column 1 then from a preponderance of the evidence do you find that such utility structures, if any, were substantial violations of the Hidden Valley Section 8 restrictions?

Answer "We do" or "We do not" in the space provided in Column 2 below for (a) and (b).

ANSWER:	Column 1 Utility structures	Column 2 Substantial violation
(a) light poles installed by builder	"WE DO NOT"	_____
(b) basketball backboard goal	" WE DO NOT"	_____

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that the Plaintiff Turner acquiesced or consented to construction and/or maintenance and/or location of (a) light poles installed by the builder in the front yards of lots in Section 8 of Hidden Valley (b) basketball backboard goals on the lots of Section 8 in Hidden Valley (c) other similar security lights on lots other than Defendant Muhammad F. Malik in Section 8 of Hidden Valley.

Answer separately "We do" or "We do not" in Column 1 for (a) (b) and (c) below.

ANSWER:	Column 1 Acquiesced or consented
(a) light poles installed by builder	"WE DO"
(b) basketball goals	"WE DO"
(c) other similar security lights in Section 8	"WE DO"

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that such acquiescense or consent by Plaintiff Turner of (a) (b) or (c) below constituted a waiver of Plaintiff Turner's right to bring this suit seeking removal of the security light installed by Defendant Malik?

By the term "waiver" is meant an intentional relinquishment of a known right, benefit or advantage which the party relinquishing would otherwise have enjoyed.

Answer separately "We do" or "We do not" in (a) (b) and (c) below.

ANSWER:

	Column 1 Waiver
(a) light poles installed by builder	"WE DO NOT"
(b) basketball goals in Section 8	"WE DO NOT"
(c) other similar security lights in Section 8	"WE DO NOT"

SPECIAL ISSUE NO. 9

What do you find from a preponderance of the evidence to be a reasonable attorney's fee to be fixed for attorney Gaylen Nix for the prosecution of this case?

Answer in dollars and cents, if any.

ANSWER: "$2,000.00"

The Plaintiff having filed his motion for judgment on the findings of the jury, and the Defendant having filed his motion for judgment non obstante verdicto, the Court finds that the evidence is insufficient to support a finding that both of the two (2) mercury security lights made a basis of this suit were installed upon Defendant's premises in Section 8 of Hidden Valley. Further it appearing to the Court from the verdict of the jury and the law applicable thereto and the admissions of the Defendant that the Plaintiff, GEORGE A. TURNER, is entitled to a mandatory permanent injunction and reasonable attorney's fees, as herein granted, same being within the pleadings, admissions, evidence, prayer and the verdict, for the reason that Defendant has violated deed restriction 11 as set forth in an instrument recorded in the Deed Records of Harris County, Texas, at County Clerk's File No. E073348, et. seq., as amended by an instrument recorded in the Deed Records of Harris County, Texas, at County Clerk's File No. E266621, et. seq., by installing or permitting the installation of a utility structure, to-wit: a mercury security light with pole upon his premises located at Lot 1159, Block 52, of Hidden Valley, Section Eight (8), a subdivision in Harris County, Texas, as shown by the corrected plat thereof recorded at Volume 216, Page 118, of the Map Records of Harris County, Texas, nearer to Bertrand Street than the rear corner of his house located upon said lot; and by further reason that the Plaintiff has no adequate remedy at law to prevent the foregoing act and has no clear, complete, and adequate remedy at law, and that the Plaintiff will suffer irreparable harm and damage to vested property rights unless this mandatory injunction be granted; and the Court finds each and every fact

necessary to support the injunction, including a finding with respect to jurisdiction and venue.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, MUHAMMAD F. MALIK, remove within forty-five (45) days of the date of the signing of this Order by the Court the utility structure, to-wit: a mercury security light, complete with pole and other aboveground appurtenances, heretofore installed upon Lot 1159, Block 52, of Hidden Valley, Section Eight (8), a subdivision in Harris County, Texas, according to the corrected map thereof recorded at Volume 216, Page 118, of the Map Records of Harris County, Texas, nearer to Bertrand Street than the rear corner of the house located upon said Lot 1159.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, MUHAMMAD F. MALIK, his spouse, agents, servants, employees, and ~~attorneys~~, and any other person in active concert or participation with him who receive actual notice hereof by personal service or otherwise, be and are hereby permanently enjoined from installing or permitting the installation upon Lot 1159, Block 52, of Hidden Valley, Section Eight (8), a subdivision in Harris County, Texas, as shown by the corrected plat thereof recorded at Volume 216, Page 118, of the Map Records of Harris County, Texas, a security light or lights or any other utility structure nearer to Bertrand Street than the rear corner of the house located upon said Lot 1159.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Clerk of this Court issue a Writ of Permanent Injunction; said Writ to be accompanied by a true and correct copy of this Order.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that HIDDEN VALLEY CIVIC CLUB, its officers and agents, as principal, and Lawyers Surety Corporation, as surety, be and are hereby discharged on the Bond of Temporary Injunction heretofore filed in this cause.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff, GEORGE A. TURNER, be and is hereby awarded a judgment in the amount of TWO THOUSAND AND NO/100 DOLLARS ($2,000.00) plus interest from the date hereof at the legal rate of 9.0%, for reasonable attorney's fees. The judgment is hereby awarded against Defendant MUHAMMAD F. MALIK, for which let execution issue if not timely paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs take nothing with respect to their request for an order enjoining the Defendant from using the property made a basis of this suit as a dwelling for more than a single family, and from parking or permitting the parking of an automobile not in daily use whether upon said lot or lots or on the street adjacent thereto for more than one week unless stored in a closed garage.

All relief not expressly granted herein is hereby denied.

All costs of court in this behalf are hereby taxed against the Defendant, for which let execution issue if not timely paid.

To which Order and Judgment of the Court the Defendant here and now excepted and gave his notice of his intention to appeal same to one of the Courts of Civil Appeal sitting in Houston, Texas.

SIGNED AND RENDERED on this _____ day of _____, 1979.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
Clyde L. Nix
Attorney for Plaintiff
218 West Little York Road
Houston, Texas 77076
697-4871
State Bar No. 15040000

_____
R. J. Strong, Jr.
Attorney for Defendant
3520 Montrose, Suite 211
Houston, Texas 77006
529-4868
State Bar No. 194-17600

APPENDIX D

AFFIDAVIT

STATE OF TEXAS:

COUNTY OF HARRIS:

BEFORE ME, the undersigned authority, on this day personally appeared RAY HARDY, District Clerk of Harris County, Texas, who being by me here and now duly sworn stated to me upon his oath as follows, to-wit:

"I am RAY HARDY, District Clerk of Harris County, Texas, and was likewise employed on December 24, 1979. I have never been convicted of a felony or a misdemeanor involving moral turpitude. I am over the age of 21 and fully competent to make this affidavit. I have personal knowledge of each and every fact contained herein.

"I am the duly elected District Clerk of Harris County, Texas and Clerk of the 125th District Court. My office for filing papers, motions, pleadings and other similar instruments is located in the Harris County Civil Courts Building.

"On December 24, 1979, my Civil Division Office on the 4th Floor of the Harris County Civil Courts Building was closed due to the day being Christmas Eve and a Harris County holiday. One seeking to file a Motion for New Trial in Cause No. 79-20713, HIDDEN VALLEY CIVIC CLUB and GEORGE TURNER VS. MUHAMMAD F. MALIK, in the 125th District Court would not have been able to file the same at the Civil Division of the District Clerk's Office on that date. The Harris County Civil Courts Building where the Civil Division of the District Clerk's Office is located was closed. There were no notices left on the door of said building indicating where such motions could be filed. However, the County Switchboard Operators have names of the District Clerk deputies who may be called in case of emergencies. One of the deputies on duty December 24, 1979 for this purpose was Thomas L. Love, Assistant Chief Deputy, to whom the County Operator would refer any emergency call relative to filings in the Civil Division of the District Clerk's Office. Mr. Love would review the particular emergency and in the event of a filing deadline, Persons are told they may file any such instruments seven (7) days a week, twenty-four hours a day at the District Clerk's Central bonding Office on the 3rd Floor of the Criminal Courts Building or may take said filing to the residence of Mr. Love if so desired.

Ray Hardy

RAY HARDY, DISTRICT CLERK
HARRIS COUNTY, T E X A S

SWORN AND SUBSCRIBED TO before me on this 18th day of April, 1980, by the said RAY HARDY, DISTRICT CLERK, to certify which witness my hand and seal of office.

Sylvia L Diaz

NOTARY PUBLIC in and for
HARRIS COUNTY, T E X A S

My Commission expires:

10-23-80

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HIDDEN VALLEY CIVIC CLUB and GEORGE A. TURNER	X	
VS.	X	CIVIL ACTION NO._____
MUHAMMAD F. MALIK	X	

PETITION FOR REMOVAL OF CIVIL ACTION

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION:

Petitioner, MUHAMMAD F. MALIK, by his undersigned attorney, respectfully shows the court:

1. Petitioner is the defendant in the above entitled action.

2. On March 10, 1980, the above entitled action was commenced against petitioner in the 125th Judicial District Court of Harris County, Texas, and is now pending therein.

3. On April 5, 1980, a deputy of C.R. Davis, Constable Precinct 4, Harris County, Texas, left a copy of the original pleading here complained of with petitioner's brother who was at petitioner's house at the time at 927 Bertrand, Houston, Harris County, Texas.

4. No further proceedings have been had herein in the 125th District Court of Harris County, Texas.

5. Plaintiff Turner is a citizen and resident of the State of Texas, and defendant is a citizen and resident of the State of Texas.

6. The above-entitled civil action against petitioner in the 125th District Court of Harris County, Texas, may be removed to this Court pursuant to 28U.S.C. Section 1443(1) on the ground that petitioner is and has been denied by such state court proceeding his rights secured and guaranteed to him by the laws providing for equal civil rights of citizens of the United States, specifically 42 U.S.C. Sections 1981, 1983, 2000a et seq. Such denial has occurred and continues to occur in that petitioner, of Pakistani origin and of the Muslim faith, is in the process of appealing a judgement entered against him on December 13, 1980. Pursuant to Rule 329b of the Texas Rules of Civil

procedure, petitioner was given ten (10) days thereafter to file a motion for new trial. Under Rule 4 the said ten (10) day period therefore end on Monday, December 24, 1979, unless for state procedural purposes, December 24, was not to be counted. In any event, pursuant to Paragraph B, Section 7, Article 9, HB558, found in the General and Special Laws of Texas, Vol. 2, Chapter 843 at 2901, the state legislature provided that state employees shall be entitled to vacation or leave time on December 24, 1979. In addition, the state legislature has provided in Article 2372h-1, Vernon's Revised Civil Statutes that each elected county officer or the Commissioner's court shall have authority to provide for vacations and holidays fixed by state law without deduction or loss of pay. It is an established fact that on December 24, 1979, the office of the District Clerk of Harris County, Texas, where the motion for new trial is to be filed, was closed due to the authority of the state legislature in the above cited legislation. Believing that he had timely filed his motion for new trial, petitioner filed his cost bond on appeal on February 26, 1980, within the thirty (30) day period under Rule 356 TRCP. Petitioner's motion for new trial was overruled on January 28, 1980, by the trial court. Shortly thereafter, petitioner caused to be placed with the clerk of the Court of Civil Appeals for the 1st Supreme Judicial District the transcript and statement of facts on March 11, 1980, and March 18, 1980, respectively, after the said Court of Civil Appeals on March 6 had granted petitioner until March 28, 1980, to file said records.

However, on or about March 10, 1980, respondent caused to be filed in the trial court his motion for contempt. This motion is being prosecuted in bad faith to deny petitioner his right of appeal under both the due process and equal protection clauses of the state and federal constitutions. Respondent's motion for contempt is being brought also in the name of the Hidden Valley Civic Club, although the trial court found they had no standing to sue as a party plaintiff. Respondent seeks to cut short petitioner's constitutional right of appeal by having

/the trial court enforce a mandatory injunction against petitioner, making any appeal on the merits moot. Of course the danger here is that respondent hopes to pressure the trial judge into holding petitioner in contempt by crowding the courtroom with irate voting citizens who will be upset if the Pakistani Muslim petitioner is not incarcerated and ordered to perform an act that will render his appellate remedies moot.

On April 10, 1980, the said Court of Civil Appeals ordered that the record on appeal be filed and held that December 24, 1980, did not toll the ten (10) day motion for new trial period and that said court did not have jurisdiction. Petitioner filed his motion for rehearing on April 10, 1980, to perfect his right to petition to the Texas Supreme Court by way of writ of error.

7. This Court has original jurisdiction of the above entitled action pursuant to 28 U.S.C. Section 1343(1) and (3), and the action may therefore be removed to this Court pursuant to 28 U.S.C. Section 1443.

8. Pursuant to 28 U.S.C. Section 1446(d), petitioner presents and files herewith a bond, with good and sufficient surety conditioned that petitioner will pay all costs and disbursement incurred by reason of the removal proceedings herein sought should it be determined that the above entitled action is not removable or that it was improperly removed.

10. A copy of the motion for contempt served on petitioner in the above entitled action is attached hereto.

11. This Petition is filed with this Court within thirty (30) days after service on petitioner of the said motion for contempt in the above entitled action.

WHEREFORE, petitioner prays that the above entitled action be removed from the 125th District Court to this Court.

Dated April 10, 1980.

R. J. Strong Jr.

R. J. Strong Jr.
3520 Montrose Blvd.
Suite 211
Houston, Texas 77006
(713/529-4868

NO. 17694

IN THE COURT OF CIVIL APPEALS
FOR THE 1st SUPREME
JUDICIAL DISTRICT

MUHAMMAD F. MALI,

Appellant

VS.

HIDDEN VALLEY CIVIC CLUB
and GEORGE TURNER

Appellees

MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

Muhammad F. Malik, Appellant in the above entitled and numbered cause, respectfully moves the court to set aside the judgement of this court entered on April 11, 1980, wherein this court ruled it did not have jurisdiction to hear this case on appeal and that such appeal was not properly perfected. As grounds for this motion Appellant shows the following:

I.

The Court of Civil Appeals erred in denying Appellant his right to appeal and in holding that it did not have jurisdiction to hear the appeal on the merits.

Appellant relied on the legislature's notice embodied in Rule 329b(1.) of the Texas Rules of Civil Procedure that Appellant's motion for new trial, could be filed within ten (10) days after judgement or other order complained of is rendered, and the same state legislature's declaration in Paragraph B, Section 7, Article 2372h-1, Vernon's Revised Civil Statutes, that provides that state employees were not required to work on December 24, 1979 and that the County Commissioner had authority from the said legislature to declare December 24, 1979, a day that state employees would not have to work.

II.

On December 24, 1979, state employees in Harris County did not work, and consequently, it was a legal impossibility to file a motion for new trial or any other motion or pleading that day due to the Ray Hardy's office being closed. The legislature in effect, has determined December 24, 1979, to be a "holiday for procedural purposes." See Mid Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (July 25, 1979). To conclude otherwise would be an absurdity and contrary to all principles of due process and equal protection under the state and federal constitutions.

WHEREFORE, Appellant respectfully requests that this motion be granted, that Appellant not be denied his right to appeal and that the judgment of the trial court be reversed.

Dated April 11, 1980.

R. J. Strong Jr.
3520 Montrose Blvd.
Suite 211
Houston, Texas 77006
713/529-4868

THE STATE OF TEXAS X

COUNTY OF HARRIS X

BEFORE ME, the undersigned authority, on this day personally appeared R. J. Strong Jr., known to me to be the person whose name is subscribed to the foregoing instrument and being first duly sworn, acknowledged that he signed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 11th day of April, 1980.

My Commission Expires:
[illegible]

Notary Public in and for
Harris County, Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Rehearing has been mailed this _____ day of _____, 1980 to opposing counsel, Gaylon Nix, Esq., 218 Little York, Houston, Texas.

R. J. Strong Jr.

NO. 17694

IN THE COURT OF CIVIL APPEALS
FOR THE 1ST SUPREME
JUDICIAL DISTRICT

MUHAMMAD F. MALIK,
Appellant

VS.

HIDDEN VALLEY CIVIC CLUB
and GEORGE TURNER
Appellees

AMENDED MOTION FOR REHEARING

Muhammad F. Malik, Appellant in the above entitled and numbered cause, respectfully moves the court to set aside the judgement of this court entered on April 10, 1980, wherein this court ruled it did not have jurisdiction to hear this case on appeal and that such appeal was not properly perfected. As grounds for this motion Appellant shows the following:

I.

The Court of Civil Appeals erred in denying Appellant his right to appeal and in holding that it did not have jurisdiction to hear the appeal on the merits.

Appellant relied on the state legislature's notice embodied in Rule 329b(1.) of the Texas Rules of Civil Procedure that Appellant's motion for new trial could be filed within ten (10) days after judgement or other order complained of is rendered, and the same state legislature's declaration in Paragraph B, Section 7, Article 9, 6558 and Article 2372h-1, Vernon's Revised Civil Statutes, that provides that state employees were not required to work on December 24, 1979 and that the County Commissioner had authority from the said legislature to declare December 24, 1979, a day that state employees would not have to work.

II.

On December 24, 1979, state employees in Harris County did not work, and consequently, it was a legal impossibility to file a motion for new trial or any other motion or pleading that day due to the Ray Hardy's office being closed. The legislature in effect, has determined December 24, 1979, to be a "holiday for procedural pruposes." See Mid Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (July 25, 1979).

To conclude otherwise would be an absurdity and contrary to all principles of due process and equal protection under the state and federal constitutions.

WHEREFORE, Appellant respectfully requests that this motion be granted, that Appellant not be denied his right to appeal and that the judgement of the trial court be reversed.

Dated April 11, 1980.

R. J. Strong Jr.
3520 Montrose Blvd.
Suite 211
Houston, Texas 77006
713/529/4868.

THE STATE OF TEXAS X

COUNTY OF HARRIS X

BEFORE ME, the undersigned authority, on this day personally appeared R. J. Strong Jr., known to me to be the person whose name is subscribed to the foregoing and being duly sworn, acknowledged that he signed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this _____ day of _____, 1980.

Notary Public in and for
Harris County, Texas

My Commission Expires:

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Motion For Rehearing has been mailed to opposing counsel, Gaylen Nix, 218 W. Little York, Houston, Texas, this 11-11 day of _____, 1980.

R. J. Strong Jr.

NO. 17694

IN THE COURT OF CIVIL APPEALS
FOR THE 1ST SUPREME
JUDICIAL DISTRICT

MUHAMMAD F. MALIK
Appellant

VS.

HIDDEN VALLEY CIVIC CLUB
and GEORGE TURNER
Appellees

SUPPLEMENTAL MOTION
FOR REHEARING

Muhammad F. Malik, Appellant, respectfully moves the court to set aside the judgment of this court entered on April 10, 1980, wherein this court ruled it did not have jurisdiction to hear this cause since this appeal was not properly perfected.

I.

The Court of Civil Appeals erred in denying Appellant his right to appeal and in holding that it did not have jurisdiction to hear the appeal on the merits.

Rule 329b(1) of the Texas Rules of Civil Procedure grants applicants ten (10) days to file a motion for new trial after judgment is rendered. Yet, this court by its ruling on April 10, 1980, has determined that Appellant Muhammad F. Malik did not have ten (10) days to file his motion for new trial, but rather only seven (7) days to file the same in order to extend the time for filing a cost bond. This is violative of due process and equal protection of the laws under both the state and federal constitutions. The state legislature has expressly granted applicants ten (10) days to file motions for new trial. Since the Civil Division Office of the Harris County District Clerk was closed on December 24, 1979 (see attached copy of statement), it was impossible under constitutional standards for the undersigned attorney to file such a motion on that date. Faced with the option of either tolling the time for which such motion could be filed in order to preserve Appellant's right to appeal

his case or shortening the time to less than ten (10) days, since December 22 and 23 were a Saturday and Sunday, respectively, and said District Clerk's office was also closed, this court has opted to interpret Rule 329b to read in the instant case that said motion for new trial "shall be filed within seven (7) days after the judgement" is rendered. In other words, without any notice to Appellant before he relied on Rule 329b's ten (10) day period, this court has determined the rule to require less than ten (10) days. This court's ruling of April 10, 1980 was therefore unconstitutional.

II.

It appears that this court in strictly construing Article 4591, V.A.C.S. in not including December 24, 1979, as a legal holiday, or apart from said statute, that December 24, 1979, would not toll the period for appeal in the instant case, it has thereby made Rule 329b unconstitutionally vague and unclear as to the legislative intent in establishing said rule.

It seems clear enough to the undersigned attorney that the state legislature did not intend for Rule 329b to be read in such a vague manner since ten (10) days was expressly granted applicants. At the same time it is apparent enough that a "holiday for procedural purposes" may include some days that are not listed under Article 4591. For instance Christmas Eve, although not a "legal holiday", may or may not be considered a "holiday for procedural purposes". That is, December 24 of any one year may or may not take on the qualities and characteristics of a "holiday for procedural purposes", it depends solely on the state's treatment of that day. The state legislator declared in Paragraph B, Section 7, Article 9, HB558 found in General and Special Laws of Texas, vol. 2, chapter 843 that state employees shall be entitled to, in addition to leave, vacation or leave time, and without deduction in in pay, December 24, 1979. December 24, 1979, was a Harris County holiday. On December 24, 1979, the Civil Division of the Harris County District Clerk's office, where motion for new trials in civil cases are filed was closed. The undersigned attorney was unable to file said motion for new trial on December 24, 1979, although he attempted to so file on that date. Yet, this court has determined in effect that,

in spite of the above, the motion for new trial should have either been filed on December 24, 1979, the tenth day after judgement when it was impossible for said attorney to do so, or within seven (7) days from said judgement. There was no notice embodied in either statute or case law to notify the undersigned attorney of the manner in which this court has interpreted the above laws. Although Rule 329b is on its face clear as to the ten (10) day period, this court has interpreted said statute in a way as to deprive Appellant of his right to appeal, and as such, has interpreted said statute in an unconstitutional manner and violative of the due process and equal protection clauses embodied in the state and federal constitutions.

Dated April 24, 1980.

R. J. Strong Jr.

R. J. Strong Jr.
3520 Montrose Blvd.
Suite 211
Houston, Texas 77006
713/529-4969

THE STATE OF TEXAS X

COUNTY OF HARRIS X

BEFORE ME, the undersigned authority, on this day personally appeared R. J. Strong Jr., known to me to be the person whose name is subscribed to the foregoing instrument and being first duly sworn, acknowledges that he signed the same for the purposes and consideration for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 24th day of April, 1980.

Notary Public in and for
Harris County, Texas

My commission expires

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Motion for Rehearing has been mailed to Mr. Gaylen Nix, 218 West Little York, Houston, Texas on this 25th day of April, 1980.

R. J. Strong Jr.
R. J. Strong Jr.

NO. _____

IN THE

SUPREME COURT OF TEXAS

MUHAMMAD F. MALIK
Petitioner

VS.

HIDDEN VALLEY CIVIC CLUB and
GEORGE A. TURNER
Respondents

R. J. STRONG JR.
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Attorney for Petitioner

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STATEMENT OF THE CASE

This cause being an appeal from the judgement rendered and entered by the trial court below, was dismissed by the Court of Civil Appeals for the 1st Supreme District of Houston because it is the opinion of the Court of Civil Appeals that the appeal bond was not timely filed in accordance with provisions of Rule 356, T.R.C.P. The opinion of the Court of Civil Appeals, however, failed to take into consideration the timely filing of Petitioner's Motion for New Trial.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under Tex. Rev. Civ. Stat. Ann. art. 1728, subdivisions 2, 3 and 6.

POINTS OF ERROR

I. Point of Error No. 1

The denial of Petitioners right to appeal was a deprivation of his rights under the Fourteenth Amendment to the United States Constitution.

II. Point of Error No. 2

The Court of Civil Appeals erred in dismissing Petitioner's appeal for want of jurisdiction.

NO. _____

IN THE
SUPREME COURT OF TEXAS

MUHAMMAD F. MALIK
Petitioner

VS.

HIDDEN VALLEY CIVIC CLUB AND
GEORGE A. TURNER
Respondents

APPLICATION FOR WRIT OF ERROR

To The Supreme Court of Texas:

Muhammad F. Malik, Petitioner, respectfully presents this Application for writ of Error to the Court of Civil Appeals for the 1st Supreme Judicial District of Texas, Houston, to review and correct the errors of law committed by said Court of Civil Appeals in Cause No. 17694 on the docket of said court entitled Muhammad F. Malik, appellant v. Hidden Valley Civic Club and George A. Turner, appellees, motion for rehearing having been overruled on April 24, 1980, and supplemental motion for rehearing haveing been overruled on May 8, 1980.

POINT OF ERROR NO. 1

The denial of Petitioners right to appeal was a deprivation of his rights under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE LAW

It is a well established principle of the law that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a state to provide appellate review. Lindsey v. Norman, 92 S.Ct. 862, 405 U.S. 56 (1972). However, where a state provides appellate review, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without

violating the Equal Protection Clause. I.B.I.D. Moreover, due process requires that state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede open and equal access to the courts. Robinson v. Beto, 426 F2d. 797 (5th Cir. 1970). "Equal protection of the law" implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination. Republic Pictures Corp. V. Kappler, 151 F.2d 543 (8th Cir. 1945) 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L. Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L. Ed. 1040. See also Swick v. Glenn L. Martin Co., 68 F.Supp. 863, (D.C. Md. 1947), affirmed 160 F.2d 483, certiorari denied 68 S.Ct. 85, 332 U.S. 772.

STATEMENT OF FACTS

On December 13, 1979, judgement was rendered in the 125th District Court of Harris County, Texas. Under the ten (10) day rule embodied in Rule 329b(1), of the Texas Rules of Civil Procedure, the last day to timely file a motion for new trial was on December 24, 1979, unless it was considered a holiday for procedural purposes. On the morning of December 24, 1979, Petitioner's attorney, R. J. Strong Jr., a black man, telephoned the Harris County switchboard operator, a white woman, regarding the Harris County District Clerk's office and was informed by the said operator that the said office was closed due to that day being a holiday. In the early afternoon of the same day, said attorney proceeded to the Harris County Civil Court Building where motions for new trial in civil cases are filed. However, having arrived at said courthouse, said attorney discovered the doors of the building were locked and a sign on the door informed him that due to December 24, 1979,

being a holiday, it was closed. There were no signs or notices directing said attorney to a place, if any, where such motions could be filed. (See affidavit of Ray Hardy attached hereto and made a part hereof). During the four and a half (4-1/2) years said attorney has practiced law in Harris County, including three (3) years with the state attorney general's office, said attorney has never known or heard of a place other than the Fourth Floor of the Harris County Civil Courts Building where the Harris County Clerk's Civil Division Office is located where such motions may be filed in the District Courts of Harris County, Texas.

On the other hand, the Affidavit of Ray Hardy, attached hereto, indicates that some attorneys could have filed a motion for new trial on December 24, 1979. Conceivably, there were two (2) classes of attorneys who could have filed a motion for new trial on the day in question: (1) those who know Ray Hardy or Tom Love personally and their telephone numbers and feel free to call these gentlemen regarding the filing of such motions when the Civil Division Office is closed on holidays; or (2) those who call the Harris County Switchboard Operator and receive the telephone number of Tom Love or other District Clerk deputy. Of course, this all assumes that the filing would be classified by that deputy as "an emergency," for if the said dep y determined December 24, 1979, was a holiday for procedural purposes or otherwise thought the filing date would be extended, the filing presumably would not be permitted.

Attorney for Petitioner, R. J. Strong Jr., did not personally know either Ray Hardy or Tom Love on December 24, 1979. Neither did

Petitioner's attorney know the telephone number of Ray Hardy or Tom Love on December 24, 1979, or even up to this writing. Even if Petitioner's attorney knew the telephone numbers of the said clerk or his deputies, without knowing he was entitled to call these persons on Christmas Eve regarding filing a motion for new trial, out of common, human courtesy, he would not have felt free to call any of said persons regarding making special provisions for him to file a motion for new trial that day. Nor would said attorney have had any reasonable expectations that said clerk or deputies would make arrangements for filing the same on Christmas Eve, their holiday from work.

Although Petitioner's attorney called the Harris County Switchboard Operator and inquired about the filing of a motion for new trial, said operator did not give him any information regarding the same. Thus, said attorney had no way of knowing that the motion could be filed that day although, presumably, some other attorneys could or may have filed similar motions that day due to their fitting into one of the two (2) above mentioned classifications.

Petitioner avers that said classifications are capricious and arbitrary and a violation of the Equal Protection Clause. Lindsey v. Norman, supra. Petitioner further alleges that said classifications make unreasoned distinctions that impede open and equal access to the courts. Robinson v. Beto, supra. Thus, all litigants similarly situated on December 24, 1979, could not have filed a motion for new trial and extended the period for filing the appeal bond due to the discriminatory effects of said classifications. Republic Pictures Corp. v. Kappler and Swick v. Glenn L. Martin Co., both supra.

Therefore, the Court of Civil Appeals dismissal of this appeal capriciously and arbitrarily deprived Petitioner of his right to appeal and makes unreasoned distinctions for Petitioner that have impeded open and equal access to the courts to him all in violation of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

POINT OF ERROR NO. 2

The court of Civil Appeals erred in dismissing Petitioner's appeal for want of jurisdiction.

STATEMENT OF LAW

Rule 329b(1) of the Texas Rules of Civil Procedure grants applicants ten (10) days to file a motion for new trial after judgment has been rendered. However, the filing of such a motion for new trial after ten (10) days have expired and before thirty (30) days have expired since the rendition of the judgment shall not operate to extend the court's jurisdiction over the judgment for a period of more than thirty (30) days from the date of the rendition of judgment Rule 329b(5). Under Rule 4 T.R.C.P, in computing any period of time prescribed or allowed by the Texas Rules of Civil Procedure, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included, and the last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday. Legal holidays in the State of Texas are enumerated in Article 4591, V.A.C.S. However, in Mid-Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (Tex. Spr. Crt. 1979), the Supreme Court of Texas held that Monday, January 2, 1978, was a "legal holiday for procedural purposes" within the meaning of Rule 4, T.R.C.P. even though said January 2, 1978, was not listed as a legal holiday under Article 4591. The Supreme Court ultimately based its holding in Mid-Continent on the fact that the number and date of state holidays

are directly related to the appropriation of funds for hours and days of work by state personnel from the State Treasury.

Article 2372h-1 provides, inter alia, that in each county of Texas, each elected county officer or the Commissioner's Court, as the case may be, shall have authority to provide for holidays fixed by State law without deduction or loss of pay for the employees working under the elected county officer or his appointees regardless of whether the employee is paid on a fixed salary basis or on the basis of an hourly or daily wage. Additionally, the Appropriations Act effective at all relevant times stated herein and found in General and Special Laws of Texas, vol. 2, chapter 843. Paragraph 3 of Section 6, at 2900 provides that holidays for State employees shall be those specified in Article 4591, V.A.C.S. However, Section 7, paragraph b, supra at 2901, provides that employees of the State shall, without deduction in salary, be entitled to, in addition to leave provided in this Section, vacation or leave time on the Friday immediately following the fourth Thursday in November, and December 24 and December 26.

STATEMENT OF FACTS

On Thursday, December 13, 1979, the Honorable Charles R. Price, judge of the 125th District Court of Harris County, Texas, rendered judgement against Petitioner in trial Cause No. 79-20713, styled Hidden Valley Civic Club and George A. Turner, plaintiffs, vs. Muhammad F. Malik, defendant. On Monday, December 24, 1979, Petitioner's attorney, the undersigned, telephoned the Harris County Switchboard Operator regarding filing a motion for new trial and was informed that the Office of Ray Hardy, District Clerk of Harris County, was closed. The undersigned

attorney in an attempt to file a motion for new trial proceeded to the Harris County Civil Courts Building where the said District Clerk's Civil Division Office is located. Upon approaching the entrance of the Harris County Civil Courts Building, the undersigned attorney found the doors of the building locked and a sign on the door that said the building was closed due to December 24, 1979, being a holiday. (See copy of affidavit of the Honorable Ray Hardy labled "Exhibit A," attached hereto and incorporated by reference). On December 26, 1979, the first day the Civil Division Office was opened since the preceeding Friday, December 21, 1979, the undersigned filed Petitioner's motion for new trial. On January 28, 1980, Petitioner's motion for new trial was overruled, after hearing, before Judge Price.

On February 22, 1980, Petitioner filed his motion to extend time to file transcript and statement of facts until March 28, 1980. On February 26, 1980, Petitioner filed his appeal bond, and pursuant to request by the Clerk of the Court of Civil Appeals for the 1st Supreme Judicial District of Texas, Houston, the undersigned mailed a letter to said Clerk advising her of the date Petitioner's motion for new trial was filed. On March 3, 1980, Respondents opposition to the motion for extension of time to file transcript and statement of facts was filed alleging, inter alia, that Petitioner already had until March 28, 1980, to file the record on appeal under Rule 386, T.R.C.P. However, on March 5, 1980, Respondents filed their first amended opposition to Petitioners motion for extension of time to file the record on appeal alleging that the Court of Civil Appeals lacked appellate jurisdiction based on the allegation that Petitioner's motion for new trial was filed tardy.

On March 6, 1980, the said Court of Civil Appeals extended the time to file the transcript and statement of facts to and including March 28, 1980. On March 11, 1980, Petitioner delivered the transcript to said Clerk who refused to file the same, and on March 18, 1980, Petitioner delivered the statement of facts to said Clerk who refused to file the same. On or about March 14, 1980, Petitioner filed a supersedeas bond in the amount of $2000.00, and on March 19, 1980, filed an additional supersedeas bond pursuant to request by Respondent.

On April 10, 1980, Petitioner filed his motion for rehearing in the Court of Civil Appeals and on April 14, 1980, filed an amendment thereof. However, on April 24, 1980, the Court of Civil Appeals overruled Petitioner's motion for rehearing. On April 25, 1980, within fifteen (15) days of filing the motion for rehearing, Petitioner filed his supplemental motion for rehearing and Respondents filed their motion in support of overruling motion for rehearing; however, on May 8, 1980, the Court of Civil Appeals refused Petitioner's supplemental motion for rehearing.

ARGUMENT

In dismissing this appeal the Court of Civil Appeals incorrectly relies on Metal Enterprises, Inc. v. Don Love, Inc., 359 S.W.2d (Tex. Civ. App. - Houston [1st Dist.] 1977, no writ). In Metal Enterprises, the judgement of the trial court was rendered on Monday, May 9, 1977 and the motion to reinstate, which is treated as a motion for new trial for procedural purposes, was filed on Tuesday, May 24, 1977, some fifteen (15) days later. Under the ten (10) day rule embodied in Rule 329b(1). T.R.C.P., the said period ended on Thursday, May 19, 1977. There were no allegations

that the days between May 19, 1977, and May 24, 1977, in any way operated to extend the time for filing the motion in question nor that the plaintiff who filed said motion was unable to file the motion due to the distinct clerk's office being closed or otherwise prevented by some state action. In the instant case, the attorney for Petitioner attempted to file the motion for new trial on the tenth day of the ten (10) day period in question, but, through no fault of his own, was unable to do so because December 24, 1979, the end of the ten (10) day period, was a day that state employees did not work and was a day that the Harris County District Clerk's office where such motions are filed was closed to him. Thus, due to state legislative action, attorney for Petitioner was unable to file the motion for new trial on December 24, 1979. General and Special Laws of Texas, vol. 4, chapter 843 and Article 2372h-1, Vernon's Revised Civil Statutes.

Therefore, the Court of Civil Appeals' reliance on Metal Enterprises, Inc. was erroneous due to the substantial difference of facts in that case as compared to the instant appeal. In fact, in Seismic & Digital Concepts, Inc. v. Digital Resources Corporation, 583 S.W.2d 442 (Tex. Civ. App. - Houston [1st Dist.] 1979), the Court of Civil Appeals, opened the door in its reasoning used in that case. In Seismic & Digital Concepts, the Appellant sought an extension of time in which to file a statement of facts under the mandatory fifteen (15) day time limit of Rule 21c, T.R.C.P., the fifteenth day ending April 13, 1979, Good Friday. Apparently, as the Court of Civil Appeals held, the attorney for appellant in that case did not call the Court of Civil Appeals but instead relied on

information relayed to him on April 12, 1979, by the Harris County Switchboard operator that April 13, 1979, was a holiday and the courthouse would be closed. The Court of Appeals in that case held that Court personnel were present the entire day and that appellant failed to file the motion within the mandatory time limit. However, in the instant appeal, Petitioner's attorney was diligent and took every reasonable step to file the motion for new trial on December 24, 1979, a day that Court personnel were not present during any part of the day, a day that was a Harris County holiday and a day that the state legislature had declared to be a day that state employees did not have to work without deduction in pay. It is inconceivable that the Court of Civil Appeals would have included the above relevant facts, in the Seismic & Digital Concepts holding if such facts were of no significance to its decision.

More importantly, however, is the Texas Supreme Court holding in Mid-Continent Refrigerator Company v. Tackett, supra. In that case, the Supreme Court held that January 2, 1978, though not listed under Article 4591, V.A.C.S., as a state holiday, was to be considered a legal holiday for procedural purposes within the meaning of Rule 4 T.R.C.P. The Supreme Court ultimately based its decision on the fact that state holidays are directly related to the appropriation of funds for hours and days of work by state personnel from the State Treasury. The state legislator apparently considered the relation of December 24, 1979, to the appropriation of funds for hours and days of work by state personnel from the State Treasury in the Appropriations Act effective on December24, 1979. General and Special Laws of Texas, vol. 2, chapter 843, Section 7, paragraph b, at 2901, provides in relevant part.

"Employees of the State shall, without deduction in salary, be entitled to, in addition to leave provided in this Section, vacation or leave time on . . . December 24."

The above legislation combined with the fact that the Harris County District Clerk's office was closed due to December 24, 1979, being Christmas Eve and a holiday as interpreted by the County Commissioner pursuant to Article 2372h-1, V.A.C.S., in effect should make December 24, 1979, a holiday for procedural purposes as applied to this Petitioner. To conclude otherwise deprives Petitioner of due process and equal protection of the law.

WHEREFORE, Petitioner prays that his Application be granted and that he be allowed to appeal this cause on the merits.

Respectfully submitted,

R. J. Strong Jr.
3520 Montrose Blvd., Suite 211
Houston, Texas 77006

THE STATE OF TEXAS X

COUNTY OF HARRIS X

BEFORE ME, the undersigned authority, on this day personally appeared R. J. Strong Jr., known to me to be the person whose name is subscribed to the foregoing instrument and after being duly sworn, acknowledged that he signed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 16 day of May, 1980.

Notary Public in and for
Harris County, Texas

My Commission Expires:
Sept. 1981

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for Writ of Error has been mailed to Gaylan Nix, Esq., 218 West Little York, Houston, Texas on this 16th day of May, 1980.

R. J. Strong Jr.

R. J. Strong Jr.